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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 362

IN THE MATTER OF THE APPLICATION
of
WATERFRONT COMMISSION OF NEW YORK HARBOR,
to punish WILLIAM MURPHY for failure to obey a Subpoena.
WILLIAM MURPHY,
Appellant,
v.
THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Appellee.

IN THE MATTER OF THE APPLICATION
of
WATERFRONT COMMISSION OF NEW YORK HARBOR,
to punish JOHN MOODY, SR., for failure to obey a Subpoena.
JOHN MOODY, SR.,
Appellant,
v.
THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

MOTION TO DISMISS APPEAL

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THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

Motion to Dismiss Appeal

Appellee, the Waterfront Commission of New York Harbor, respectfully moves that the appeal herein be dismissed

upon the ground that no substantial question respecting the constitutionality of a state statute, as applied, is involved herein.

Statement

This is an appeal from a judgment of the Supreme Court of New Jersey, dated May 22, 1961, affirming a judgment of the Superior Court of New Jersey, dated June 20, 1960, which adjudged the appellants herein (William Murphy and John Moody, Sr.) guilty of civil contempt and which ordered that appellants be fined $50 each and that they be incarcerated until they obey a subpoena of the Waterfront Commission.

The facts are as follows. The American Export Lines, Inc., which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the port of New York, including Hoboken. The employment of Markley commenced May 16, 1960. Prior to the commencement of his employment with American Export Lines, Markley was an investigator for the Waterfront Commission and his principal assignment was to cover said piers and terminals of American Export Lines, Inc., in Hoboken.

On Monday, May 16, 1960, when the employment of Markley for American Export Lines commenced as aforesaid, a work stoppage began of the longshoremen and checkers employed by the American Export Lines in Hoboken, New Jersey. This work stoppage, except for the morning of Tuesday, May 17, 1960, continued through Friday, May 20, 1960.

Under the Waterfront Commission Act, the longshoremen and checkers who participated in this work stoppage were required to be and are registered by the Waterfront Commission. Also, under the Waterfront Commission Act, Markley, as Chief Security Officer of American Export

Lines, must be and is licensed by the Waterfront Commission as a port watchman.

The Commission instituted the instant investigation seeking to determine whether the purpose of the work stoppage was illegally to coerce an employer (the American Export Lines) to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and further to determine whether any persons registered or licensed by the Commission were violating any provision of the Waterfront Commission Act by participating in such illegal coercion.

In connection with such investigation, subpoenas of the Commission were duly served on May 18, 1960, on William Murphy, the business agent of Local No. 2 of the International Longshoremen's Association, representing longshoremen in Hoboken, New Jersey, and upon John Moody, Sr., organizer for the ILA in the State of New Jersey. Both Murphy and Moody appeared at the offices of the Commission in response to these subpoenas on the afternoon of May 19, 1960.

Moody, after giving his name and address, testified that he was a union official and refused to answer any other questions. Murphy testified that he was business agent of Local No. 2, and represented members of his local working at the American Export Piers in Hoboken. He stated that he knew the pier did not work on Monday [May 16, 1960] and that it was common knowledge for the previous ten days that things were not normal at Piers A, B, and C, Hoboken [American Export Lines Piers]. Murphy then refused to answer whether this condition was related to the appointment of Markley as Chief Security Officer and refused to answer any further questions.

The reasons for such refusal to testify, insofar as can be discerned, comprised the following grounds: (1) the work stoppage was a matter which the Commission had no statutory authority to investigate; (2) the work stop-

page was a matter over which the National Labor Relations Board had exclusive jurisdiction; (3) the Commission had no right to investigate the work stoppage since civil litigation may ensue as a result thereof (i.e., the American Export Lines had threatened to sue the ILA); and (4) the Commission's investigation sought to inquire into privileged communications between union and management and/or between union representatives. Neither Moody nor Murphy asserted the privilege against self-incrimination. The last two grounds ((3) and (4)) were abandoned by appellants in the Supreme Court of New Jersey.

Statutes Involved

The Waterfront Commission Act was enacted by the States of New York and New Jersey in 1953 (N. Y. Laws, 1953, c. 882 (McK. Unconsol. Laws 6700aa and following); N. J. Laws 1953, c. 202 (N.J.S.A. 32:23-1 and following)) for the purpose of eliminating racketeering and other various evils on the waterfront in the port of New York Harbor, which had been publicly exposed by various investigative bodies. Since Part I of the Act encompasses the Waterfront Commission Compact, an interstate compact between the States of New York and New Jersey, Part I of the Act was submitted to and approved by Congress (Act of August 12, 1953, c. 407, 67 Stat. 541).

Pursuant to the mandate of the Waterfront Commission Compact that it eliminate the evil conditions found to have existed on the waterfront, the Waterfront Commission is clothed with broad investigatory powers. Thus, Article IV of the Waterfront Commission Compact provides:

> "In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:
>
> • • • • • •

"8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;

* * * * * *

"11. To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objective of this compact;

* * * * * *

"13. To make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district, for the alleviation of the evils described in article I and for the effectuation of the purposes of this compact * * *." (McK. Unconsol. Laws 6700dd; N.J.S.A. 32:23-10.)

Witness is defined under Section 5-a(4) of the Act as "* * * any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act." (McK. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85.)

The Waterfront Commission Compact (Art. XIV, Sec. 1) specifically provides that the failure to obey a subpoena of the Commission is punishable as a contempt of court, as follows:

"The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case therein pending." (McK. Unconsol. Laws 6700nn: N.J.S.A. 32:23-62.)

ARGUMENT

POINT I

The appeal should be dismissed because no substantial question respecting the constitutionality of a state statute, as applied, is involved herein.

A. Appellants' Federal Preemption Claim.

1. Appellants purportedly bring the instant appeal pursuant to the provisions of 28 U.S.C. § 1257(2) upon the ground that certain provisions of the Waterfront Commission Act relating to the Commission's investigatory powers, as construed and applied by the court below, is in conflict with the National Labor Relations Act, apparently because the work stoppage herein might have involved an unfair labor practice over which it is claimed only the National Labor Relations Board would have jurisdiction (Jurisdictional Statement, pp. 4-6).

In order to sustain an appeal to this Court under 28 U.S.C. § 1257(2), appellant is required to make "explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Rohr Aircraft Corp.* v. *County of San Diego,* 362 U. S. 628, 629. Thus, for example, the "decisions [of this Court] have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's federal rights, privileges or immunities will not sustain an appeal." *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 650. Here, appellants contended in the courts below only that the Commission's *investigation* as such, and not that the application of any particular provisions of the Waterfront Commission Act, was invalid as being in conflict with the National Labor Relations Act. (See appellants' brief in the court below.) Consequently, under well-established principles, no appeal lies under 28 U.S.C. § 1257(2).

Indeed, appellants belated contention respecting the allegedly unconstitutional application of certain provisions of the Waterfront Commission Act was not even asserted by appellants in a timely manner in this Court. For in their notice of appeal to this Court, appellants again object to the constitutionality of the Commission's *investigation* as such, rather than to the application of any particular provisions of the Waterfront Commission Act. Appellants thus state in their Notice of Appeal (pp. 4-5), insofar as here material, the following:

> "The following questions are presented:
>
> 1. Do the pre-emptive effects of 29 U.S.C.A. §§ 157, 158 (LMRA) operate upon the subject matter of this case so as to deprive the Waterfront Commission of New York Harbor of the jurisdiction and authority asserted by it in its subpoenas addressed to the appellants, in its interrogation of the appellants, and in its contempt proceedings against the appellants in the Court of New Jersey?"
>
> • • •

Appellants failure to specify in their notice of appeal the allegedly unconstitutional application by the court below of any particular provision of the Waterfront Commission Act as being one of the questions involved herein is sufficient, without more, to bar the instant appeal. Cf. *Braniff Airways* v. *Nebraska State Board of Equalization and Assessment*, 347 U. S. 590, 597, at footnote 14 (on appeal from state court, Supreme Court would not consider questions not preserved in jurisdictional statement); Supreme Court Rule 23(1)(c) (only questions presented in petition for certiorari will be considered by Supreme Court).

2. Appellants belatedly contend in their Jurisdictional Statement (pp. 4-6) that the provisions of the Waterfront Commission Compact empowering the Commission to conduct investigations and, further, making the failure to

obey a subpoena of the Commission punishable as a contempt of court have been so construed and applied by the court below as to be in conflict with the National Labor Relations Act. However, since the Compact has been approved by Congress, the claim of a conflict between the Compact and the National Labor Relations Act is untenable by hypothesis. Cf. *DeVeau* v. *Braisted,* 363 U. S. 144, 153, wherein it was said respecting Section 8 of the Waterfront Commission Act: "Had § 8 been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption". The most that appellants can claim is that the within investigation was *ultra vires* the statutory authorization of the Compact, which is not of course an appealable question under 28 U.S.C. § 1257(2).

The only other provision of the Waterfront Commission Act referred to by appellants in the Jurisdictional Statement (pp. 4-6) is Section 5-a(4) which defines the term "witness" (*supra,* p. 5). Section 5-a(4) was not part of the original Compact but instead was subsequently enacted by the States of New York and New Jersey pursuant to the following provisions of Article XVI, Section I of the Compact:

> "Amendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the legislatures of either state concurred in by the legislatures of the other." (McK. Unconsol. Laws 6700pp; N.J.S.A. 32:23-70.)

First, insofar as 28 U.S.C. § 1257(2) is concerned, it is apparent that the constitutional validity of Section 5-a(4) (defining "witness") is no more drawn into question by the instant investigation than is Article III, Section 1 of the Compact creating the Commission in the first instance. Appellants' objection to the instant investigation goes to the question of the subject matter or scope of the investigation (as to which Section 5-a(4) is entirely extraneous)

rather than to the question of amenability to subpoena as such. And the scope of the Commission's investigatory power is defined by Article IV of the Compact which has been approved by Congress (*supra*, pp. 4-5) (e.g., Article IV, Section 11, empowering the Commission "to make investigations, collect and compile information concerning waterfront practices generally").

Further, the purpose of Section 5-a(4) was simply to obviate the objection "that registrants and licensees whose conduct is under investigation are not subject to Commission process" (Legislative Memorandum of Waterfront Commission, McKinney's 1957 Session Laws of New York, p. 2052) and neither of the appellants herein is a registrant or licensee. In other words, appellants plainly were subject to subpoena under the investigatory provisions of Article IV of the Compact even without reference to Section 5-a(4). Finally, there can, in any event, be no reasonable doubt that Section 5-a(4) is within the scope of Article XVI, Section 1 of the Compact (*supra*, p. 8) and thus within the Congressional consent to amendments and supplements to the Compact implementing the purposes thereof. Cf. *DeVeau* v. *Braisted, supra.*

B. Appellants' Due Process Claim.

1. Appellants claim here that they were not apprised of the purpose of the Commission's investigation until the Commission filed its papers in the Superior Court of New Jersey to have appellants adjudged guilty of civil contempt and that, therefore, the within civil contempt adjudication is violative of due process. No such claim was made by appellants in the courts below. (See appellants' brief in the court below; also the Jurisdictional Statement, p. 19a.) This explains why the Supreme Court of New Jersey in its lengthy and careful opinion herein did not even discuss such claim (Jurisdictional Statement, pp. 1a-30a). It also explains appellants' contention

(plainly erroneous of course) that their due process claim may properly be raised for the first time before this Court (Jurisdictional Statement, p. 24).

Even as asserted in this Court, appellants' contention is that the Commission's *investigation* as such was violative of due process, and not that any particular provision of the Waterfront Commission Act was so construed and applied as to be violative of due process (Jurisdictional Statement, pp. 7, 24). As noted, this is not a sufficient basis for an appeal under 28 U.S.C. § 1257(2).

2. In any event, appellants' due process contention is plainly without substance. For the fact is that appellants were more than sufficiently apprised by the Commission as to the purpose of the Commission's investigation. Thus, when appellant Moody appeared at the Commission's offices in response to the Commission's subpoena, he was specifically informed as follows (Appellants' printed appendix in the court below, pp. 14a, 22a):

> "JOHN MOODY, SR., residing at 1111 Washington Street, Hoboken, New Jersey, appearing as a witness, having been duly sworn, testified as follows:
>
> By Mr. Piazza:
>
> Q. What is your name and address? A. John Moody, Sr., 1111 Washington Street, Hoboken, New Jersey.
>
> Q. Mr. Moody, you are here pursuant to subpoena; is that correct, sir? A. That's right.
>
> Mr. Florio: Prior to the inception of the interrogation, might I ask, for the benefit of myself and on behalf of my client, what the purpose of the investigation is in order that I may so advise Mr. Moody what his rights are.
>
> Mr. Piazza: Mr. Florio, the purpose of the investigation is to ascertain facts surrounding a work

stoppage at Piers 'A', 'B' and 'C', Hoboken, New Jersey.

Mr. Florio: Yes.

Mr. Piazza: Fair enough?

Mr. Florio: That's good enough.

• • • • • •

By Mr. Sirignano:

Q. Mr. Moody, I understand that you have taken the position that you are not going to answer any questions here; is that correct, sir? A. That's correct.

Q. Do you understand that we are conducting an investigation to determine whether any violations of the Compact are being committed in connection with the present work stoppage at the American Export Lines at Piers A, B and C in Hoboken? You understand that?

Mr. Florio: He has been so advised, Mr. Sirignano."

And appellant Murphy was specifically informed as follows (appendix, pp. 32a, 33a):

"William Murphy, residing at 218 Roosevelt Street, Union City, New Jersey, appearing as a witness, having been duly sworn, testified as follows:

By Mr. Sirignano:

Q. Mr. Murphy—

Judge Wall: Just a minute.

Pardon me, Mr. Sirignano, would you kindly outline the purpose of this meeting?

Mr. Sirignano: Yes.

Judge Wall: For the purpose of the record.

Mr. Sirignano: This is an investigation pursuant to the powers vested in the Commission in the Waterfront Commission Compact, to determine whether there are any violations of the Waterfront

Commission Compact in the pending work stoppage at the Hoboken Piers.

Judge Wall: In a pending work stoppage?

Mr. Sirignano: Yes."

No claim was ever made by appellants before the Commission that they had not been sufficiently informed as to the purposes of the Commission's investigation (Appellants; Jurisdictional Statement, p. 19a). Further, even after the Commission's contempt papers were filed in court, appellants did not claim that they had not been informed by the Commission as to the purposes of the investigation. Rather, they repeated the same grounds for their refusal to testify that they had asserted at the Commission's offices (Appendix, pp. 28a-30a). In addition, by their own argument herein that they were not informed of the purpose of the Commission's investigation until the Commission filed its contempt papers in Superior Court, even appellants concede that at least by that time they had been sufficiently informed respecting the Commission's investigation. On June 17, 1960, the Superior Court, by oral opinion (Jurisdictional Statement, p. 15a), adjudged appellants guilty of civil contempt. However, the Superior Court specifically gave appellants an opportunity to purge themselves of the contempt (Jurisdictional Statement, p. 30a). But appellants persisted in their refusal to testify and, consequently on June 20, 1960, the Superior Court entered its judgment of civil contempt. Accordingly, appellants' contention that the within civil contempt adjudication is violative of due process because they were not informed of the purpose of the Commission's investigation is plainly untenable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant motion to dismiss the appeal herein should be granted.

Respectfully submitted,

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Dated: September 22, 1961.

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